

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**UNITED STATES OF AMERICA f/b/o)
DOTEN'S CONSTRUCTION, INC.,)**

Plaintiff)

v.)

**JMG EXCAVATING &)
CONSTRUCTION CO., INC., et al.,)**

Defendants)

Docket No. 03-134-P-S

GREENWICH INSURANCE COMPANY,)

Third-Party Plaintiff)

v.)

**JMG EXCAVATING &)
CONSTRUCTION CO., INC., et al.,)**

Third-Party Defendants)

**RECOMMENDED DECISION ON MOTIONS AND CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

Presently before the court are motions for summary judgment filed by the plaintiff, the third-party plaintiff and each of the defendants on various claims and cross-claims in this action arising out of a construction project at the Brunswick Naval Air Station.¹

¹ Summary judgment has been granted in favor of Greenwich Insurance Company on its claims against third-party
(continued on next page)

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

defendants JMG Excavating & Construction Co., Inc. (“JMG”), Crown Performance Company, Judith M. Gro and Brian D. (continued on next page)

The mere fact that both parties seek summary judgment on particular claims does not render summary judgment inappropriate. 10A Charles Wright, Arthur Miller & Mary Kane, *Federal Practice and Procedure* (“Wright, Miller & Kane”) § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, “the court must consider each motion separately, drawing inferences against each movant in turn.” *Merchants Ins. Co. of New Hampshire, Inc. v. United States Fidelity & Guar. Co.*, 143 F.3d 5, 7 (1st Cir. 1998) (citation omitted). If there are any genuine issues of material fact, the opposing motions must be denied as to the affected issue or issues of law; if not, one moving party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

II. Factual Background

The statements of material facts filed by the parties pursuant to this court’s Local Rule 56 include the following undisputed material facts.

Defendant J.A. Jones Management Services, Inc. (“Jones”) was selected by the Navy to act as the general contractor in the renovation of Hangar One at the Brunswick Naval Air Station (“the Project”). Statement of Facts Submitted by JMG Excavating and Construction Co., Inc., Supporting Its Motion for Summary Judgment (“JMG SMF”) (Docket No. 132) ¶ 1; Fireman’s Fund Insurance Company’s Response to Statement of Facts Submitted by JMG Excavating & Construction Co., Inc. Supporting Its Motion for Summary Judgment, etc. (“Fireman’s JMG Responsive SMF”) (Docket No. 91)² ¶ 1.

Gro. Docket No. 86.

² During a telephone conference with counsel for all parties, I granted the oral motion of counsel for JMG for leave to refile its motion for summary judgment, originally filed only against Fireman’s Fund Insurance Company (“Fireman’s Fund”), Docket No. 64, to seek summary judgment against both Fireman’s Fund and Jones, Docket No. 128. The refiled motion, Docket No. 131, was accompanied by a statement of material facts, Docket No. 132, that is identical to the statement of material facts filed in support of the original motion, Docket No. 65. Instead of filing a new but identical response to the second statement of material facts, Fireman’s Fund and Jones incorporated the original response filed by Fireman’s Fund, Docket No. 91, by reference into their response to the refiled motion, Opposition of Fireman’s Fund Insurance Company and J.A. Jones Management Services, Inc. to Motion for Summary Judgment, etc. (Docket No. 133) at 2. JMG contends (continued on next page)

Fireman’s Fund issued a bond on behalf of Jones for the Project (the “Fireman’s bond”), as required by the Miller Act, 40 U.S.C. § 3131, *et seq.* *Id.* ¶ 2. Jones hired JMG as a subcontractor. *Id.* ¶ 3. The Project was originally designed by Oest Associates, Inc. *Id.* ¶ 5.

JMG hired Becker Structural Engineers, Inc. to work as a subcontractor for JMG. *Id.* ¶ 7. On December 20, 2001 Paul Becker wrote a letter to a representative of JMG and sent a copy to a representative of Jones. *Id.* ¶ 8. After reviewing the condition of the roof of Hangar One and considering the Oest design, Becker determined that he had “grave concerns that the roof trusses in their current and repaired condition do not have the capacity” to meet building code requirements. *Id.* ¶ 9. Becker concluded: “We consider the existing conditions to present an extremely dangerous condition . . . [t]he Navy should consider closing Hangar [sic] 1 until the results of the above evaluations are complete.” *Id.* ¶ 10. JMG communicated its safety concerns to Jones. *Id.* ¶ 11. Jones communicated those safety concerns to the Navy. *Id.* ¶ 12. Less than a month later, Susanne Grant, the project engineer for the Navy, admitted, in writing, that the Oest design would not comply with building code requirements and directed that the Project should proceed anyway. *Id.* ¶ 13.

The Navy designated Paul Becker as the project architect/engineer. *Id.* ¶ 15. Becker then became responsible for all of the engineering on the Project. *Id.* ¶ 17. Becker’s design enlarged the scope of work by JMG required to complete the Project. *Id.* ¶ 18. The Becker design involved a steel truss exoskeleton to be constructed around the outside of Hangar One. *Id.* ¶ 19. The design of the Project evolved as

that such incorporation by reference “is not cognizable under the Federal Rules of Civil Procedure” and that its refiled statement of material facts therefore “must be deemed admitted *in toto*,” Reply Statement of Facts Submitted by JMG Excavating and Construction Co., Inc., etc. (Docket No. 135) at 1 n.1. Contrary to JMG’s argument, Fed. R. Civ. P. 10(c) does not support its position. This court will not so elevate form over substance as to penalize a party for its attempt to minimize the sheer volume of documents filed in this case by choosing not to file a document identical to one already before the court but rather directing the court’s attention to the already-filed document.

construction was proceeding. *Id.* ¶ 21. The Navy solicited estimates of additional costs involved with the Becker design from Jones. *Id.* ¶ 22. A January 10, 2003 Request for Equitable Adjustment was the first time JMG put together written notice of the scope of extra work for which it was seeking payment. Additional Statement of Material Facts of Fireman’s Fund Insurance Company in Support of Its Opposition, etc. (“First Fireman’s SMF”) (included in Fireman’s Responsive SMF beginning at 4) ¶ 34; Reply Statement of Facts Submitted by JMG Excavating and Construction Co., Inc. Supporting Its Motion for Summary Judgment (“JMG First Responsive SMF”) (Docket No. 135) ¶ 34. On March 18, 2002 Grant sent an e-mail to Jones stating that she wanted to issue a contract modification “before anyone starts ordering parts and materials.” *Id.* ¶ 35. Jones passed this information along to JMG. *Id.*

On April 9, 2002 the Navy and Jones executed Modification #1 to their contract which provided that Jones would prepare all drawings and specifications for the installation of new steel trusses on the roof of Hangar One and that this work would be done at no additional cost. *Id.* ¶ 36. Modification 1 substituted the March 18, 2002 drawings of Becker for the Oest design. JMG SMF ¶ 16; Fireman’s JMG Responsive SMF ¶ 16. Under the initial Oest design, JMG was only required to execute the construction phase of the Project. Greenwich Insurance Company’s Statement of Material Facts in Support of Its Motion for Summary Judgment, etc. (“Greenwich SMF”) (Docket No. 73) ¶ 29; Plaintiff’s Opposing Statement of Material Facts to Defendant Greenwich Insurance Company’s Motion for Summary Judgment (“Doten Greenwich Responsive SMF”) (Docket No. 107) ¶ 29. With the new Becker design, the Navy changed the task order so that JMG was ultimately responsible for designing and building the Project. *Id.* JMG did not have the opportunity to design the Project fully before it was built. *Id.* ¶ 31. JMG could not provide an accurate cost for the revised Project because the price had to develop as the design developed.

Id. ¶ 33. Becker did not issue drawings that were 100% complete until September 2002; there was not way anyone could give a fair estimate of the cost until September 2002. *Id.* ¶¶ 34-35.

At no time while the work was being performed did the Navy indicate to Jones that it would refuse to pay the additional costs for the Becker Design. JMG SMF ¶ 23; Fireman's JMG Responsive SMF ¶ 23. Jones considered the likely cost of completion of the Becker design to be between \$1.8 million and \$1.9 million. *Id.* ¶ 24. Jones expected to be paid and communicated that expectation to JMG. *Id.* ¶ 26. Jones told the Navy that the extra cost was going to be approximately one million dollars over the initial contract amount. *Id.* ¶ 27. The Becker design and JMG's performance on the Project were regarded as a success. *Id.* ¶ 29.

In late 2002, plaintiff Doten's Construction, Inc. ("Doten") was hired as a second-tier subcontractor on the Project by JMG. Plaintiff Doten's Construction, Inc.'s Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment ("Doten SMF") (Docket No. 67) ¶ 2; Fireman's Fund Insurance Company's Response to Statement of Facts Submitted by Doten's Construction, Inc. Supporting Its Motion for Summary Judgment, etc. ("Fireman's Doten Responsive SMF") (Docket No. 93) ¶ 2; Greenwich Insurance Company's Response to Plaintiff's Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment, etc. ("Greenwich Doten Responsive SMF") (Docket No. 99) ¶ 2; JMG Excavating and Construction Co., Inc.'s Opposing Statement of Material Facts in Opposition to the Motion for Summary Judgment of Plaintiff, etc. ("JMG Doten Responsive SMF") (Docket No. 95) ¶ 2.

Defendant Greenwich Insurance Company ("Greenwich") issued a payment bond on behalf of JMG in connection with the Project (the "Greenwich bond"). *Id.* ¶ 5. There was no written contract between JMG and Doten. *Id.* ¶ 6. At least initially JMG and Doten agreed that JMG would pay Doten on a "time and

materials” basis for all labor and material costs incurred by Doten on the Project plus an agreed-to markup. *Id.*

Doten invoiced JMG on a weekly basis for all labor and materials supplied during the preceding week. *Id.* ¶ 7. Prior to hiring Doten, JMG did not disclose to Doten the due date for payments from Jones or the Navy nor did it otherwise describe to Doten its specific payment arrangements with those parties. *Id.* ¶ 8. The total value of the work and materials supplied by Doten to JMG and the Project is \$206,370.51, of which JMG had paid to Doten \$120,016.51. *Id.* ¶ 10.³ All labor and materials supplied by Doten on the Project were satisfactory to JMG, which acknowledges that Doten is entitled to be paid. *Id.* ¶ 12. Fireman’s Fund and Greenwich concede that Doten’s work was performed in a satisfactory manner. *Id.* Upon JMG’s failure to pay Doten, Doten filed a timely proof of claim with Fireman’s Fund and Greenwich on their respective bonds. *Id.* ¶ 13. Neither Fireman’s Fund nor Greenwich has paid Doten anything in response to these claims. *Id.* ¶ 14. Doten’s last day of work on the Project was in January 2003. *Id.* ¶ 15. Within 90 days after completing its work, Doten’s sent to Jones a detailed listing of its invoices and their “associated open balances.” Statement of Material Facts of Fireman’s Fund Insurance Company in Support of its Motion for Summary Judgment Against Doten’s Construction, Inc. (Docket No. 77) ¶ 12; Plaintiff’s Opposing Statement of Material Facts to Defendant Fireman’s Fund Insurance Co.’s Motion for Summary Judgment (Docket No. 104) ¶ 12.

This Project was an anomaly insofar as it is very unusual to change from one architectural design to a completely different one. Greenwich SMF ¶ 41; Doten Greenwich Responsive SMF ¶ 41. The Oest and Becker designs were completely different from one another. *Id.* ¶ 42. The Project went from repair of

³ JMG purports to qualify its response to this paragraph of Doten’s statement of material facts, but the qualification (also *continued on next page*)

existing trusses to adding substantial new structural components to the hangar. *Id.* ¶ 44. During the refinement of the Becker design, Jones and JMG were being paid out of the funds that were earmarked for the initial task order. *Id.* ¶ 45. The Navy chose to keep the amount of the original task order in place to pay for the work as it proceeded. *Id.* ¶ 46. JMG ultimately submitted a Request for Equitable Adjustment from Jones in the amount of \$874,513 for the additional costs it alleged it had incurred as a result of the abandonment of the Oest design. *Id.* ¶ 50. All of the work performed by JMG and Doten on the Project was done pursuant to the Becker design. *Id.* ¶¶ 62-63. Jones in turn submitted the request for equitable adjustment to the Navy. Statement of Material Facts of Fireman’s Fund Insurance Company in Support of Its Motion for Summary Judgment Against JMG Construction and Excavating [sic], Inc. (“Fireman’s SMF”) (Docket No. 82)⁴ ¶ 28; JMG Excavating and Construction Co., Inc.’s Opposing Statement of Material Facts in Opposition to the Motion for Summary Judgment of Fireman’s Fund, etc. (“JMG Fireman’s Responsive SMF”) (Docket No. 101) ¶ 28.

III. Discussion

A. Motions on JMG’s Cross-Claims

expressed as a denial) lacks any citation to the summary judgment record, JMG Doten Responsive SMF ¶ 10, and will accordingly be disregarded. Local Rule 56(c).

⁴ Fireman’s Fund contends that all of the facts set forth in this document must be deemed admitted because JMG’s qualifications or denials in response fail to comply with Local Rule 56. Motion of Fireman’s Fund Insurance Company to Deem Fireman’s Fund Insurance Company’s Facts Admitted (Docket No. 123) at 1-2. Asserting that “exposing each of these attempts to muck up the record would require numerous pages of discussion,” Fireman’s Fund declines to do so, instead inviting the court “to make its own determination.” *Id.* at 2. It is incumbent upon a party seeking relief in the nature of striking many or all of the entries in an opposing party’s statement of material facts to identify for each such entry the reason or reasons why it is entitled to that relief. While this court always determines for itself whether a denial or qualification of a particular material fact included in a moving party’s statement of material facts is properly supported by the citation given to the summary judgment record, and always disregards purported denials or qualifications that are unsupported by any such citation, I decline Fireman’s Fund’s invitation to undertake the work that should be performed by its own counsel. A motion to deem facts admitted is superfluous under Local Rule 56 in any event. My opinion notes the facts presented in Fireman’s Fund’s statement of material facts on which I rely. The motion to deem any other entries in that document admitted is denied.

JMG seeks summary judgment against Jones and Fireman's Fund on Counts II-IV of its cross-claim.⁵ Motion for Summary Judgment of JMG Excavating and Construction Company, Inc., etc. ("JMG Motion") (Docket No. 131) at 4-13. Only one of these counts is asserted against Fireman's Fund: Count III, alleging violation of 10 M.R.S.A. § 1111 *et seq.* JMG Cross-Claims ¶¶ 12-13. That count, along with Count II, alleging violation of the Miller Act, 40 U.S.C. § 3131 *et seq.*, and Count IV, asserting a claim in *quantum meruit*, are asserted against Jones. *Id.* ¶¶ 5-17. Jones and Fireman's Fund seek summary judgment on all four counts of JMG's cross-claim.⁶ Motion for Summary Judgment of Crossclaim Defendant Fireman's Fund Insurance Company, etc. ("Fireman's JMG Motion") (Docket No. 81) at 1-2.⁷ JMG contends that Fireman's Fund is liable for the obligations of Jones by operation of the Miller Act, JMG Motion at 3-4, and Jones and Fireman's Fund appear to agree, Fireman's JMG Motion at 2. *See generally GE Supply v. C & G Enters., Inc.*, 212 F.3d 14, 17 (1st Cir. 2000) (describing role of Miller Act).

1. *Count III.* Count III of the cross-claim seeks recovery under 10 M.R.S.A. § 1111 *et seq.* Cross-Claims ¶¶ 12-13. Jones and Fireman's Fund contend that this claim is preempted by the Miller Act. Fireman's JMG Motion at 13-14. JMG asserts that it has established the four required elements of such a statutory claim as they are set forth in *Jenkins, Inc. v. Walsh Bros., Inc.*, 776 A.2d 1229, 1237 (Me.

⁵ Count I of the cross-claim seeks contribution and indemnity from Jones and Fireman's Fund, as well as Greenwich, if JMG is found liable to Doten at trial. Amended Answer and Amended Cross-Claims of Defendant JMG Excavating & Construction Co., Inc. to Plaintiff's First Amended Complaint (Docket No. 24), Cross-Claims (beginning at 7) ("JMG's Cross-Claims") ¶¶ 1-4.

⁶ Fireman's Fund has requested oral argument on its motion for summary judgment against JMG. Fireman's Fund Insurance Company's Request for Oral Argument (Docket No. 124). The parties' papers provide a sufficient basis on which to decide the motion. The request for oral argument is denied.

⁷ The caption to the motion notwithstanding, it is apparent that the motion is filed on behalf of both Fireman's Fund and Jones. The first paragraph of this motion states that Jones and Fireman's Fund are entitled to summary judgment against Doten, Fireman's JMG Motion at 1, but it is clear from the body of the motion that it in fact deals with JMG's cross-claims rather than any claims asserted by Doten.

2001). JMG Motion at 7-8. In response to the argument raised by Jones and Fireman's Fund, JMG reiterates the argument made in its own motion for summary judgment and adds that its claim under the Maine statute is for "additional but separate" relief, namely an increase in the contract price of \$148,790.48 authorized by the Navy which it asserts Jones "never claimed . . . for payment" nor "remitted to JMG." Objections of JMG Excavating and Construction Co., Inc. to the Motion for Summary Judgment of J.A. Jones and Fireman's Fund Insurance Company, etc. ("JMG Fireman's Fund Opposition") (Docket No. 97) at 16-18. Jones and Fireman's Fund do not respond to this argument.

The Maine statute at issue proves remedies that "are intended to augment damages that are traditionally available for contract or quantum meruit claims." *Jenkins*, 776 A.2d at 1237. In *United States ex rel. Great Wall Constr., Inc. v. Mattie & O'Brien Mech. Contracting Co.*, 2001 WL 127663 (D. Me. Feb. 14, 2001), the plaintiff brought claims under the Miller Act and a state statute, seeking only attorney fees and interest under the state statute, *id.* at *2. This court held that this represented an impermissible attempt to expand the Miller Act remedy and dismissed the state statutory claim. *Id.* Thus, to the extent that JMG seeks attorney fees and interest or other penalties under the state statute with respect to a claim that it may assert under the Miller Act, Jones and Fireman's Fund are entitled to summary judgment on those claims. In addition, to the extent that the substantive claim under the state statute is the same as that brought under the Miller Act, the same result appears to be required, an outcome anticipated by JMG's assertion that its claim under the state statute is actually for relief that is in addition to and separate from that sought in its Miller Act claim. However, both claims as set forth in JMG's cross-claims seek identical relief of \$1,111,069. Cross-Claims ¶10 (Count II) & demand for relief at 9 (Count III). The sole substantive allegation in Count III is that "the conduct of J.A. Jones . . . and Fireman's Fund" "[a]s set forth above" violates the Maine statute. *Id.* ¶ 13. JMG does not attempt to explain why the asserted fact

that Jones never actually claimed a sum made available by the Navy which JMG apparently contends was part payment for work performed by JMG takes that particular sum of money outside the scope of the Miller Act. Such a sum certainly appears to be included within the remedy set forth in the Miller Act:

Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought

40 U.S.C. § 3133(b)(1). Jones and Fireman's Fund are entitled to summary judgment on Count III of JMG's cross-claim.

2. *Count IV*. Jones, the only defendant against which Count IV of JMG's cross-claim is asserted, Cross-Claims ¶¶ 13-18, contends that JMG may not pursue a claim sounding in *quantum meruit* when it is also seeking relief on a written contract under the Miller Act. Fireman's JMG Motion at 15-16. JMG asserts that it has established the elements of a *quantum meruit* claim as set forth in *Associated Builders, Inc. v. Oczkowski*, 801 A.2d 1008, 1010 n.2 (Me. 2002). JMG Motion at 8-13. It responds to Jones's motion by restating its initial argument and observing, briefly, that *quantum meruit* claims are permitted under the Miller Act. JMG Fireman's Opposition at 18-20. That response does not address the point raised by Jones: that *quantum meruit* claims are not allowed when there is an express contractual basis for the Miller Act claim.

"[T]he Miller Act does not substitute a cause of action in quantum meruit in derogation of the provisions of an express contract." *United States ex rel. Mobile Premix Concrete, Inc. v. Santa Fe Eng'rs, Inc.*, 515 F. Supp. 512, 516 (D. Colo. 1981). However, this court has held that "to the extent that a remedy in quantum meruit is provided by applicable state contract law, such a remedy may be

asserted in a suit under the Miller Act.” *United States ex rel. Arlmont Air Condition Corp. v. Premier Contractors, Inc.*, 283 F. Supp. 343, 348 n.8 (D. Me. 1968). In that case, this court allowed a defaulting contractor whose breach of the contract was not willful and who had in good faith supplied a net benefit to the other party to recover under the Miller Act on a *quantum meruit* theory. *Id.* at 348-49. In the present case, JMG asserts that its *quantum meruit* claim is limited to the value of extra work performed “in excess of the initial contract price.” JMG Fireman’s Opposition at 18. That the claim is so limited is not apparent from the face of the cross-claim. Cross-Claims ¶¶ 14-18. Jones contends that it is entitled to summary judgment only because, it asserts, JMG failed to satisfy the requirements of the written contract. Fireman’s JMG Motion at 16. Under *Premier Contractors*, the mere fact of such a breach is insufficient to foreclose a *quantum meruit* claim under the Miller Act. As limited by JMG, its claim would be allowed under Maine law even where an express contract existed. *See Maine Sand & Gravel Co. v. Green & Wilson, Inc.*, 133 Me. 313, ___, 177 A. 185, 186 (1935). Accordingly, Jones is not entitled to summary judgment on Count IV on the basis of this argument.

Jones argues, in the alternative, that it is entitled to summary judgment on this count because JMG cannot prove its damages. Fireman’s JMG Motion at 16-19. The measure of damages in *quantum meruit* is the value of the services provided. *Paffhausen v. Balano*, 708 A.2d 269, 271 (Me. 1998). Jones contends that JMG cannot prove any such damages because the value of construction services can only be determined by an expert witness, and JMG has not designated any expert to testify about the value of the work it contends it performed in excess of the contract price. Fireman’s JMG Motion at 17-19. In response, JMG refers to its argument that it can prove its damages with respect to Count II without having designated an expert witness on the subject. JMG Fireman’s Opposition at 20. However, that portion of JMG’s brief deals with its calculation of the extra costs it allegedly incurred in completing the work, not the

value bestowed by its services. *Id.* at 11-16. To the extent that JMG contends that Ernest Agresto, a certified public accountant who prepared its request for equitable adjustment but was not designated as an expert witness, may nonetheless offer a “lay opinion” as to the “worth” of JMG’s services, *id.* at 13, that argument is based on a ruling in a case in which the opinions were offered by the corporate officers whose compensation was at issue, the individuals who had actually rendered the services in question. *Builders Steel Co. v. Commissioner of Internal Revenue*, 179 F.2d 377, 379-80 (8th Cir. 1950). JMG has offered no evidence that would allow the court to conclude that Agresto himself rendered the services the value of which is at issue in connection with the *quantum meruit* claim. In addition, the precedential value of a 1950 case dealing with the need for expert testimony and the question whether lay opinion is sufficient, when the Federal Rules of Evidence which expressly address expert testimony, F. R. Evid. 701-06, first took effect in 1973, Federal Civil Judicial Procedure and Rules (West 2004), Rules of Evidence for United States Courts and Magistrates, Historical Note, at 391, is severely limited.

JMG also argues that Jones “admitted the reasonableness of the extra costs contained in the request for equitable adjustment.” JMG Fireman’s Opposition at 15. It offers no authority to support this position, other than an argument that, because Jones did not commit fraud by submitting JMG’s request to the Navy, Jones must have been vouching for its reasonableness. In any event, this argument goes to the reasonableness of the costs which JMG asserts that it incurred, not the value of the services it provided over and above the services contemplated by the written contract. JMG offers no argument, let alone any citation to authority, suggesting that its costs and the value of the services it bestowed are one and the same.

Because the record is devoid of evidence as to the damages available on JMG’s *quantum meruit* claim, as it has limited that claim, Jones is entitled to summary judgment on Count IV of the cross-claim.

3. *Count II.* Count II of JMG's cross-claim invokes the Miller Act. Cross-Claims ¶¶ 6-11.⁸ JMG contends that it is entitled to summary judgment on this count because it performed extra work with the knowledge and acquiescence of Jones and the Navy and because the subcontract between Jones and JMG authorized the extra work at issue. JMG Motion at 4-7. Jones and Fireman's Fund take the position that they are entitled to summary judgment on this count because JMG failed to comply with the subcontract's notice terms, JMG's claim was not authorized by Jones in writing as required by the subcontract, the Navy did not pay Jones for the claim submitted by JMG and JMG cannot prove its damages. Fireman's JMG Motion at 6-13.

Fireman's Fund's motion relies on a particular term of the subcontract between Jones and JMG. *Id.* at 6. It purports to quote that provision and cites to paragraph 4 of its statement of material facts. *Id.* That paragraph, however, merely states, in full: "The scope and terms of the agreement between Jones and JMG are memorialized in a written Subcontract dated November 8, 2001 (the "Subcontract"). Fireman's SMF ¶ 4. That statement would ordinarily be insufficient to put any provision of that document before the court, but JMG in its response argues only that Jones waived the provision by its conduct, that Jones is estopped from invoking the provision and that the provision was waived by circumstances. JMG Fireman's Opposition at 3-10. These arguments necessarily assume that the provision on which Fireman's Fund relies was in fact included in the written subcontract.⁹ The paragraph at issue provides, in relevant part:

In the event of any dispute or claim by Subcontractor hereunder, notice in writing of such claim shall be given to Contractor no later than seven (7) days following

⁸ In its title, Count II states that it is brought against Jones, but the demand for relief at the end of the count seeks relief against Jones, Greenwich and Fireman's Fund. Cross-Claims at 8-9. I will assume that the claim is asserted against both moving parties, Jones and Fireman's Fund.

⁹ JMG purports to deny paragraph 4 of Fireman's Fund's statement of material facts, but its denial does not contend that a written agreement did not exist. JMG Fireman's Responsive SMF ¶ 4. Rather, it attempts to characterize the subcontract as a "framework" which does not memorialize all of the terms of the agreement between Jones and JMG.

the event, decision or other action out of which the claim arises, or such lesser period as may be required under the Contract. Such notice shall describe such dispute or claim in detail. If Subcontractor fails to provide such notice, the claim or dispute and all monetary and other relief associated therewith shall be deemed as waived and abandoned by Subcontractor.

J.A. Jones Management Services, Inc., Subcontract (Exh. A to Answer and Cross-Claims of Defendant JMG Excavating & Construction Co., Inc. (Docket No. 11)) (“Subcontract”) ¶ 24.

Fireman’s Fund cites cases in which similar contractual waiver provisions were enforced, even when the contractor knew about the claims that the subcontractor failed to file formally in a timely fashion, *e.g.*, *Allied Fire & Safety Equip. Co. v. Dick Enters., Inc.*, 972 F. Supp. 922, 929 (E.D. Pa. 1997); *United States ex rel. Chase Somerset Corp. v. Becon Servs. Corp.*, 837 F. Supp. 461, 465 (D.D.C. 1993), but the courts in those cases noted that there might be circumstances under which such clauses would not be enforced, 972 F. Supp. at 929-30 (noting factual dispute as to whether party seeking to enforce waiver provision prevented party seeking recovery from complying with notice provision); 837 F. Supp. at 465 (noting that plaintiff offered no “legal justification to overcome the plain, unambiguous language of the subcontract’s” waiver provision). Here, JMG both offers legal and factual reasons why it contends the contractual notice provision should not be enforced. Fireman’s Fund contends that JMG “supplies no fact . . . that Jones somehow agreed to allow JMG to wait to submit its notice of the scope and cost of additional work” and “cannot point to a single fact in the record that shows that Jones misled JMG into believing the notice provision would not be enforced.” Reply Brief in Support of Motion for Summary Judgment of Crossclaim Defendant Fireman’s Fund Insurance Company, etc. (“Fireman’s JMG Reply”) (Docket No. 120) at 3. While the record information cited by JMG in this regard is minimal, JMG Fireman’s Opposition at 4-5, the legal standard applicable to consideration of motions for summary judgment requires that JMG be given the benefit of all reasonable inferences to be drawn from the facts at this stage. When that

standard is applied here, it is not possible to conclude that Jones and Fireman's Fund are entitled to summary judgment as a matter of law on the issues of waiver or estoppel. Fireman's JMG Reply at 4. There is sufficient evidence to the effect that JMG did not comply with the notice provision to prevent the entry of summary judgment for JMG on Count II as well.

Fireman's Fund asserts, briefly, that "no written change order was ever issued for the work for which JMG claims additional costs" and that JMG's Miller Act claim is therefore barred by the terms of the subcontract. Fireman's JMG Motion at 9. The provision of the subcontract on which Fireman's Fund relies provides that the contractor may order extra or additional work, "such changes to be effective only upon written order of Contractor." Subcontract ¶ 8. The paragraph of its statement of material facts on which Fireman's Fund bases this argument is denied by JMG. Fireman's SMF ¶ 20; JMG Fireman's Responsive SMF ¶ 20. Fireman's Fund and Jones are not entitled to summary judgment on this basis, because there is a disputed issue of material fact.

Fireman's Fund next contends that JMG is not entitled to recover on its Miller Act claim because the subcontract provides that Jones will pay JMG only to the extent allowed and paid by the Navy and Jones has already paid JMG more than the Navy paid Jones for work done by JMG. Fireman's Motion at 9. The provision of the subcontract cited by Fireman's Fund in support of this argument deals only with progress payments. Subcontract ¶ 3. It is not clear from the summary judgment record whether the payment sought by JMG in its cross-claim is appropriately characterized as a progress payment rather than the final payment which is discussed in paragraph 4 of the subcontract. In addition, as JMG points out, the language of the Miller Act does not suggest that a subcontractor may be barred from recovering on a contractor's payment bond when the government fails to pay the contractor; it provides merely for recovery by a subcontractor that has not been paid in full within 90 days after finishing the work for which payment is

sought. 40 U.S.C. § 3133(b)(1). Fireman's Fund does not suggest any reason why the terms of the subcontract should override the statute. In addition, the two paragraphs of its statement of material facts on which Fireman's Fund relies in support of this argument¹⁰ are denied by JMG, although the denial of the second of the two paragraphs is ineffective due to the lack of any citation to the summary judgment record. Fireman's SMF ¶¶ 8-9; JMG Fireman's Responsive SMF ¶¶ 8-9.¹¹ Both paragraphs are necessary to the success of Fireman's Fund's argument, so it is not entitled to summary judgment on this basis.

Finally, Fireman's Fund contends that it and Jones are entitled to summary judgment on this claim because JMG has not identified an expert witness to testify as to its damages. Fireman's Motion at 10-13. JMG responds that Ernest Agresto will offer testimony about its damages and that "[t]he inquiry into Agresto's qualifications as an expert is an issue to be resolved at trial." JMG Fireman's Opposition at 11. This response fails to address the issue raised by Fireman's Fund. In this court, parties are required to designate witnesses who will offer expert testimony at trial by a date specified in the scheduling order. JMG apparently did not so designate Agresto. Whether he is qualified to offer expert testimony is not the issue. Nor is the weight to be accorded Agresto's testimony, another issue to which JMG devotes some effort, *id.* at 14-15, before the court at this time. Perhaps recognizing the tenuousness of its position, JMG contends that Agresto's opinion as to the costs sought by JMG is admissible as lay witness opinion because he prepared the request for equitable adjustment that apparently includes all of the costs now sought by JMG.

¹⁰ Mistakenly identified as "Defendants [sic] SMF." Fireman's Motion at 9.

¹¹ JMG cites only to the cross-claim of Jones against JMG in support of its denial of paragraph 8. JMG Fireman's Responsive SMF ¶ 8. Ordinarily, citation to an unverified pleading is insufficient to support a denial responding to a particular paragraph in a statement of material facts, but in this instance the statement in the pleading of Jones, one of the parties seeking summary judgment on the basis of the assertions in the denied paragraph, can only be deemed an admission by Jones. Answer of J.A. Jones Management services, Inc., etc. (Docket No. 16), Cross-Claim of J.A. Jones Management Services, Inc. Against JMG Excavating & Construction Co., Inc., ¶ 6. Neither Jones nor Fireman's Fund is entitled to summary judgment on the basis of a factual assertion at odds with its own pleading, in the absence of any acknowledgement of and explanation for the variance.

Id. at 12-14. While I agree with JMG that Agresto “is certainly competent to testify as to how the REA was prepared, and also the REA’s content,” *id.* at 13-14, the fact that he prepared this document does not mean, contrary to JMG’s assumption, that he “rendered the services” that are the subject of JMG’s claim or that he was familiar with the nature of the work done by JMG and its value, in the language of *Builders Steel*, the 1950 case on which JMG relies.

Fireman’s Fund asserts, Fireman’s JMG Motion at 10, without citation to authority, that JMG must show that the amount which it seeks under the bond is reasonable¹² and that the work which it performed for which it seeks payment was necessary. JMG has made no showing that Agresto may offer an opinion on either point as a lay witness. The governing rule provides that a witness who is not testifying as an expert may testify “in the form of opinions or inferences” when those opinions or inferences are “rationally based on the perception of the witness” and “not based on scientific, technical, or other specialized knowledge.” Fed. R. Evid. 701. A statement by Agresto that the work performed by JMG on the Project was “necessary” or that the amount it sought as payment for that work was “reasonable” would be a statement of opinion (or an inference) that could only be based on specialized knowledge and would not be based on Agresto’s own direct perception.

However, Fireman’s Fund’s assumption that JMG must prove that the amounts which it seeks under the Miller Act are reasonable and that the work it performed was necessary is not supported by case law. *See, e.g., United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 966-67 (5th Cir. 1998) (Miller Act damages must be based on actual labor, material and equipment costs which subcontractor had expended; citing cases in which total cost method used to calculate damages in Miller Act cases); *United*

¹² “JMG agrees that the work performed would have to be reasonable.” JMG Fireman’s Responsive SMF ¶ 22.

States ex rel. Taylor & Polk Constr., Inc. v. Mill Valley Constr., Inc., 29 F.3d 154, 160-61 (4th Cir. 1994) (measure of damages to subcontractor in Miller Act case is amount spent in performance of contract plus lost profit and overhead). In the absence of authority supporting the basic assumption underlying Fireman's Fund's argument, I cannot recommend that summary judgment be granted on this basis.

4. *Count I.* Count I of the cross-claim seeks contribution and indemnity from Jones and Fireman's Fund. Cross-Claims ¶¶ 1-4. Fireman's Fund makes the same arguments with respect to its motion for summary judgment on this count as it makes in support of its motion with respect to Count II. Fireman's JMG Motion at 5-13. For the reasons set forth in my discussion of Count II of the cross-claim above, I recommend that the motion be denied with respect to Count I as well.

B. Cross-Motions of Plaintiff, Fireman's Fund and Greenwich

The plaintiff seeks summary judgment on Counts I, II, III, V and VI of its second amended complaint against JMG, Fireman's Fund and Greenwich. Plaintiff Doten's Construction, Inc.'s Motion for Summary Judgment, etc. ("Plaintiff's Motion") (Docket No. 66) at 1. Count I asserts a claim under the Miller Act against all of these defendants but the plaintiff seeks summary judgment only against Fireman's Fund; Count II asserts a claim under 10 M.R.S.A. § 1111 against all of these defendants, but the plaintiff seeks summary judgment only against JMG and Greenwich; Count III asserts a claim in *quantum meruit* against all of these defendants; Count V alleges breach of contract against JMG, but the plaintiff seeks summary judgment against all of these defendants;¹³ and Count VI alleges that Greenwich breached its obligations under a bond issued to JMG. Second Amended Complaint, etc. ("Complaint") (Docket No. 34) ¶¶ 13-22, 28-37; Plaintiff's Motion at 2. Fireman's Fund seeks summary judgment on all counts of the

¹³ Because the second amended complaint asserts Count V only against JMG, I will not consider further the plaintiff's
(continued on next page)

second amended complaint that are asserted against it (Counts I-IV).¹⁴ Fireman's Fund Insurance Company's Motion for Summary Judgment Against Plaintiff Doten's Construction, Inc. ("Fireman's Doten's Motion") (Docket No. 76) at 1-2. Greenwich seeks summary judgment on all claims asserted against it in the second amended complaint (Counts I-IV and VI). Greenwich Insurance Company's Motion for Summary Judgment Against the Plaintiff, etc. ("Greenwich Motion") (Docket No. 72) at 1-2.

1. Claims Against Fireman's Fund. The plaintiff "does not contest" Fireman's Fund's argument that it and Jones are entitled to summary judgment on Count II of the second amended complaint and that Fireman's Fund is entitled to summary judgment on Count IV. Plaintiff's Objection to Fireman's Fund Insurance Company's Motion for Summary Judgment, etc. ("Plaintiff's Fireman's Opposition") (Docket No. 103) at 2 n.1. Count II asserts a claim under Maine's prompt payment statute, and for the reasons discussed above in Section III(a)(1) of this recommended decision, I conclude that the Miller Act preempts that state-law claim under the circumstances of this case. Count IV asserts a claim under 24-A M.R.S.A. § 2436-A, a state statute which provides a cause of action to persons injured by certain actions taken "by that person's own insurer." The opinion of this court which I discussed in connection with the prompt-payment statute deals explicitly with section 2436-A, finding its invocation by a party seeking also to recover under the Miller Act to be a forbidden attempt to expand the Miller Act remedy. *Great Wall*, 2001 WL 127663 at *2. Fireman's Fund is entitled to summary judgment on Counts II and IV of the second amended complaint, and Jones is entitled to summary judgment on Count II.

a. Count I

request in its motion that summary judgment be entered on this claim against Fireman's Fund and Greenwich as well.
¹⁴ According to counsel for Fireman's Fund, this motion is to be construed as being brought by Jones as well. Docket No. 128.

In response to the plaintiff's argument with respect to the notice it provided, Fireman's Fund has withdrawn its motion for summary judgment on Count I of the second amended complaint. Fireman's Fund Insurance Company's Reply in Support of Its Motion for Summary Judgment Against Plaintiff Doten's Construction, Inc. ("Fireman's Doten's Reply") (Docket No. 125) at 2. The notice argument was the only opposition offered to the plaintiff's motion for summary judgment on this count, Fireman's Fund Insurance Company's Opposition to Motion for Summary Judgment of Doten's Construction, Inc. ("Fireman's Doten's Opposition") (Docket No. 92) at 4-5, but this court must nonetheless consider the merits of that portion of the plaintiff's motion, *Lopez v. Corporación Azucarera de Puerto Rico*, 938 F.2d 1510, 1517 (1st Cir. 1991).

The plaintiff contends that it is entitled to summary judgment on Count I of the second amended complaint, which seeks recovery under the Miller Act on the payment bond issued by Fireman's Fund to JMG, because it has submitted undisputed evidence that it met the requirements for recovery on such a claim. Plaintiff's Motion at 3. The governing section of the Miller Act provides, in relevant part:

Every person who has furnished labor or material in the prosecution of the work provided for in [any] contract [for the construction, alteration, or repair of any public building or public work of the United States], in respect of which a payment bond is furnished . . . and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made

40 U.S.C. § 270b(a) (parenthetical material taken from 40 U.S.C. § 270a(a)). The plaintiff supplied both labor and materials to the Project. Doten SMF ¶¶ 2, 7, 9-10; Fireman's Doten Responsive SMF ¶¶ 2, 7, 9-10. All of the labor and materials supplied by the plaintiff were satisfactory to JMG, and JMG acknowledges that the plaintiff is entitled to be paid. Doten SMF ¶ 12; Fireman's Doten Responsive SMF ¶ 12; JMG's Doten Responsive SMF ¶ 12. Fireman's Fund concedes that the plaintiff's work was performed in a satisfactory manner. Doten SMF ¶ 12; Fireman's Doten Responsive SMF ¶ 12. The plaintiff filed a timely proof of claim with Fireman's Fund on its bond. *Id.* ¶ 13. Fireman's Fund was aware of the plaintiff's claim within days after the plaintiff notified Jones that it had not been paid by JMG. *Id.* Doten's last day of work on the Project was in January 2003 and it initiated this action on June 2, 2003. *Id.* ¶ 15. The total unpaid principal balance currently owed to the plaintiff in connection with the Project is \$86,354. *Id.* ¶ 11.

To establish a claim under section 270b(a),

a labor or material supplier must prove that (1) the labor or materials were supplied in prosecution of the work provided in the contract; (2) the supplier has not been paid; (3) the supplier had a good faith belief that the labor or materials were intended for the specified work; and (4) the jurisdictional requisites of the Miller Act have been met.

United States ex rel. Polied Envtl. Svs., Inc. v. Incor Group, Inc., 238 F.Supp.2d 456, 460 (D. Conn. 2002); *United States Dep't of Navy ex rel. Andrews v. Deltra Contractors Corp.*, 893 F. Supp. 125, 130 (D.P.R. 1995). The jurisdictional requisite at issue is timely and adequate notice, *Incor*, 238 F.Supp.2d at 460, an issue no longer disputed by Fireman's Fund and for which evidence has been submitted. Sufficient undisputed evidence has also been submitted on the other elements of this claim.¹⁵

¹⁵ The plaintiff's good faith belief that its labor and materials were intended for the Project may easily be inferred from the (continued on next page)

Accordingly, on the showing made, the plaintiff is entitled to summary judgment against Fireman's Fund on Count I of the second amended complaint.

b. Count III

Remaining for consideration on the cross-motions of the plaintiff and Fireman's Fund is Count III, which asserts a claim in *quantum meruit*. Complaint ¶¶ 18-22. The plaintiff contends that it may recover against a surety in *quantum meruit* as "a Miller Act claimant." Plaintiff's Motion at 8. However, it offers no reason why Fireman's Fund should be so held liable, asserting only that it may be. *Id.* at 8-9. In response, Fireman's Fund relies on its arguments in support of its own motion for summary judgment on this count. Fireman's Dotsen's Opposition at 6. In support of its own motion, Fireman's Fund contends that the plaintiff cannot state a *quantum meruit* claim against Jones and that it cannot prove the value of its services because it has not designated an expert witness. Fireman's Dotsen's Motion at 9-14. The plaintiff responds that it need not prove that it is entitled to recover directly from the prime contractor in order to pursue a *quantum meruit* claim against Fireman's Fund but merely that its claim comes within the terms of the Miller Act bond and that it need not offer expert testimony in order to recover on its *quantum meruit* claim under Maine law. Plaintiff's Fireman's Opposition at 5-8.

The problem with the initial arguments of both Fireman's Fund and the plaintiff is that Count III is not brought under the Miller Act. On its face, it is a state common-law claim. Complaint ¶¶ 18-22. As the parties appear to acknowledge in their arguments concerning the need for expert testimony, Maine law

undisputed facts in the summary judgment record concerning the plaintiff's involvement in the Project.

governs this claim. To the extent that the plaintiff means to assert a separate Miller Act claim in Count III, it cannot recover twice under the Miller Act, and I have already recommended that summary judgment be entered for the plaintiff against Fireman's Fund on Count I, which clearly does present a Miller Act claim by its terms. Any Miller Act argument raised in connection with Count III is therefore moot. I will accordingly address Count III only as a state-law claim, and the only dispute presented by the parties in this regard concerns the need for expert testimony to prove damages.¹⁶

Maine law is not particularly clear on this point. In *Jenkins*, a case on which the plaintiff relies, Plaintiff's Fireman's Opposition at 6-7, the evidence considered by the trial court in determining damages on a *quantum meruit* theory in a construction case was "the testimony of [the plaintiff's] representatives," 776 A.2d at 1236. Fireman's assertion that these representatives "could have (and should have) been designated as expert witnesses," Fireman's Dote's Reply at 3, is not helpful. From all that appears in the opinion, the actual testimony on which the trial court relied could have been provided by employees or officers of the plaintiff without the need to characterize them as expert witnesses. 776 A.2d at 1233 (initially agreed-upon compensation, plaintiff's total claimed labor costs, determination that plaintiff claimed inflated premium pay rate, certified payrolls, profit and overhead factor of 30%). Even in the case law cited by Fireman's Fund, a claimant was allowed to prove the reasonable value of its services for purposes of a *quantum meruit* claim through the testimony of witnesses who had expertise in the subject matter and first-hand knowledge of the services that were rendered. *H.H. Roberston Co. v. V.S. DiCarlo Gen.*

¹⁶ I note that a claim for *quantum meruit* under Maine law requires proof that the plaintiff rendered services to the defendant. *Paffhausen*, 708 A.2d at 271. Neither party has offered any authority to support the proposition that a surety may be held liable on a *quantum meruit* claim under Maine law when the plaintiff provided no services to the surety. See generally *Larkin Enters., Inc. v. Manafort Bros., Inc.*, 2002 WL 31236084 (Me. Super. Sept. 13, 2002), at *3 (declining to extend *quantum meruit* claim to owner of property when subcontractor plaintiff had direct contractual relationship only with contractor).

Contractors, Inc., 950 F.2d 572, 576 (8th Cir. 1991) (Missouri law). Fireman’s offers no basis on which this court may reasonably conclude that the plaintiff’s employees and officers could not so testify in this case.

The plaintiff contends that it and JMG agreed on a fixed hourly rate for its work on the Project and that this, along with factual testimony regarding the number of hours worked, is all that its required to establish the reasonable value of its labor.¹⁷ Doten’s Fireman’s Opposition at 8; *see also* Doten’s SMF ¶¶ 6-7, 9-11; Fireman’s Doten’s Responsive SMF ¶¶ 6-7, 9-11. Maine case law cited by Fireman’s Fund merely shows that expert opinion was offered with respect to damages in certain *quantum meruit* cases; in none of those cases did the Law Court hold or even indicate that expert testimony was required. Maine case law does suggest that inferential judgments about the value of improvements may be made for purposes of unjust enrichment or *quantum meruit* claims when proof of actual costs or cash outlays is presented. *Landry v. Landry*, 697 A.2d 843, 845 (Me. 1997) (unjust enrichment); *A.F.A.B. v. Town of Old Orchard Beach*, 657 A.2d 323, 325 (Me. 1995) (same); *Belanger v. Haverlock*, 537 A.2d 604, 606 (Me. 1988) (*quantum meruit*). This would appear to be a particularly valid approach when the parties have agreed to certain charges for the hours and materials. Under the circumstances, I conclude that Fireman’s Fund is not entitled to summary judgment on Count III of the second amended complaint due to the lack of a designated expert witness on damages.

2. *Claims Against JMG.* The plaintiff seeks summary judgment against JMG on Counts II-III and V. Plaintiff’s Motion at 2.

¹⁷ The plaintiff asserts that this analysis would also establish the reasonable value of the materials it supplied, Doten’s Fireman’s Opposition at 8, but I fail to see how evidence of hourly labor rates and hours worked could do so. However, it is clear that the plaintiff provided JMG with its actual material costs and that the parties agreed that the plaintiff would be paid those costs “plus an agreed-to markup.” Doten’s SMF ¶ 6; Fireman’s Doten’s Responsive SMF ¶ 6.

With respect to Count II, which seeks recovery under Maine's prompt payment statute, 10 M.R.S.A. § 1111 *et seq.*, Complaint ¶¶ 16-17, the plaintiff contends that it is entitled to recover penalties and attorney fees from JMG as a result of waiting "for months to be paid for work that no one disputes was promptly and properly performed," Plaintiff's Motion at 9. It points out that, pursuant to 10 M.R.S.A. § 1114(2), a subcontractor must pay a sub-subcontractor's invoices within twenty days of receipt if it fails to disclose to the sub-subcontractor the due date for receipt of payments from the owner, and asserts that neither Jones nor JMG made such a disclosure to it. *Id.* at 10. The plaintiff contends that it has submitted undisputed evidence that proves all of the elements of a *quantum meruit* claim under Maine law, the claim asserted in Count III. *Id.* at 7-8. Finally, it asserts that it is entitled to summary judgment on Count V, which alleges breach of contract, because "JMG does not dispute that it owes Doten the \$86,354 principal balance pursuant to the parties' contract." *Id.* at 6. JMG provides a single response to each of these arguments: that a dispute of material fact exists as to the payment terms of the contract. Objections of JMG Excavating and Construction Co., Inc. to the Motion for Summary Judgment of the United States of America, etc. ("JMG Doten's Opposition") (Docket No. 94) at 2-5.

Specifically, JMG contends that, while the oral agreement between it and the plaintiff originally provided "that Plaintiff would invoice JMG on a time and materials basis," the method of payment was modified "on or about August 8, 2002." *Id.* at 3. After the modification, JMG contends, the parties agreed that "JMG would pay Plaintiff for the monthly invoices submitted by Plaintiff to JMG 'as JMG receives it's [sic] check from J.A. Jones.'" *Id.* at 3-4. In support of this assertion, JMG cites paragraphs 7-11 and 17-20 of the statement of material facts that it submitted in opposition to the plaintiff's motion. *Id.* at 3-5. Paragraphs 7-11 are JMG's responses to paragraphs of the plaintiff's statement of material facts. Plaintiff's

SMF ¶¶ 7-11; JMG's Doten Responsive SMF ¶¶ 7-11.¹⁸ Paragraph 10 of JMG's response must be disregarded because it is unaccompanied by any citation to the summary judgment record. Only the first sentence of paragraph 11 of JMG's response supports its argument on this issue; the second sentence of paragraph 11 is unaccompanied by any citation to the summary judgment record and accordingly will be disregarded. Paragraphs 17-20, which appear in a statement of additional facts submitted by JMG, are clearly and correctly disputed by the plaintiff. Statement of Additional Facts of JMG Excavating and Construction Co., Inc. (included in JMG's Doten Responsive SMF, beginning at [3]) ¶¶ 17-20; Plaintiff's Reply Statement of Material Facts to JMG Excavating & Construction Co., Inc.'s Opposing Statement of Material Facts, etc. (Docket No. 116) ¶¶ 17-20.

JMG does not explain how this disputed modification bars the plaintiff's specific claims. The plaintiff's reply memorandum addresses only its claim under Maine's prompt payment statutory scheme, which is set forth in Count II. Plaintiff's Reply to JMG Excavating & Construction Co., Inc.'s Objection to Plaintiff's Motion for Summary Judgment, etc. ("Plaintiff's JMG Reply") (Docket No. 115) at 2-7. The plaintiff contends that 10 M.R.S.A. § 1114(2) precludes any consideration of the actual payment terms of the contract at issue. *Id.* at 4. That section of the Maine prompt payment statutes provides:

Notwithstanding any contrary agreement, a contractor or subcontractor shall disclose to a subcontractor or material supplier the due date for receipt of payments from the owner before a contract between those parties is entered. Notwithstanding any other provision of this chapter, if a contractor or subcontractor fails to accurately disclose the due date to a subcontractor or supplier, the contractor or subcontractor is obligated to pay the subcontractor or supplier as though the 20-day due dates in section 1113, subsection 3 were met.

¹⁸ To the extent that JMG intends to rely on factual statements included in its qualifications or denials of paragraphs in the moving party's statement of material facts in support of its arguments, rather than merely to show that facts on which the moving party relies are disputed, the better practice would have been to repeat those facts in its own separate statement of additional material facts.

10 M.R.S.A. § 1114(2). Subsection 3 of section 1113 provides: “Except as otherwise agreed, payment of interim and final invoices is due from the owner 20 days after the end of the billing period or 20 days after delivery of the invoice, whichever is later.” The plaintiff relies on paragraph 8 of its statement of material facts, Plaintiff’s JMG Reply at 4, which states:

Prior to hiring Doten on the Project, JMG never disclosed to Doten the due date for receipt of payments from J.A. Jones or the Navy, nor did JMG otherwise describe to Doten its specific payment arrangements with those parties.

Plaintiff’s SMF ¶ 8. JMG’s response to that paragraph is the following:

Qualified. The only certainty with respect to the progress of the Brunswick NAS Project was that it had to be completed prior to September 2002. Exhibit A at ¶ 14.

JMG’s Doten’s Responsive SMF ¶ 8.¹⁹ This qualification cannot reasonably be construed to constitute a denial of the assertion that JMG did not make the disclosure required by Maine’s prompt payment statute. That is the crucial fact for purposes of 10 M.R.S.A. § 1114(2). The statute explicitly prohibits modification of its terms by any agreement between a subcontractor and its subcontractor or material supplier. Accordingly, the plaintiff is entitled to summary judgment against JMG on Count II.

With respect to Count III, the *quantum meruit* claim, the plaintiff contends that it supplied labor and materials to JMG “with its clear knowledge and consent” and that “[t]here is no dispute that the parties’ [sic] contemplated that Doten would be paid for its work,” thus establishing the elements of such a claim. Plaintiff’s Motion at 8. It relies on paragraphs 2, 10 and 12 of its statement of material facts. *Id.*

A valid claim in *quantum meruit* requires: that (1) services were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment.

¹⁹ Exhibit A to Docket No. 95 is the affidavit of Brian D. Gro. It has no paragraph 14.

Paffhausen, 708 A.2d at 271 (citation and internal quotation marks omitted). The cited paragraphs of the plaintiff's statement of material facts establish that JMG hired the plaintiff as a second-tier subcontractor, that JMG has paid the plaintiff part of the value of the labor and materials which it supplied and that JMG "acknowledges that Doten is entitled to be paid." Plaintiff's SMF ¶¶ 2, 10, 12; JMG's Doten's Responsive SMF ¶¶ 2, 10, 12. Were it not for the disputed evidence offered by JMG to the effect that the plaintiff agreed that it would not be paid further until JMG was paid by Jones or the Navy, the plaintiff might be correct. However, that evidence, if credited, would allow a factfinder to conclude that the circumstances did not make it reasonable for the plaintiff to expect payment unless and until JMG had itself been paid. For that reason, the plaintiff is not entitled to summary judgment on Count III against JMG.

With respect to Count V, the plaintiff contends that it is entitled to summary judgment because "JMG does not dispute that it owes Doten . . . \$86,354 . . . pursuant to the parties' contract." Plaintiff's Motion at 6. It relies on paragraphs 2, 7 and 10-11 of its statement of material facts. Paragraph 11, which asserts that "[t]he total unpaid principal balance currently owed by JMG to Doten in connection with the Project is \$86,354.00," Plaintiff's SMF ¶ 11, is properly denied by JMG, JMG's Doten's Responsive SMF ¶ 11, which asserts that this amount is not "owed . . . yet" because of the parties' alleged modification of the contract's payment terms. Accordingly, the plaintiff is not entitled to summary judgment on Count V, which is asserted only against JMG.

3. *Claims Against Greenwich.* The plaintiff seeks summary judgment against Greenwich on Counts II, III and VI. Plaintiff's Motion at 2. Greenwich seeks summary judgment against the plaintiff on Counts I-IV and VI, all of the counts asserted against it in the complaint. Greenwich Motion at 1-2. In response, the plaintiff "does not contest Greenwich's arguments" with respect to Count IV. Plaintiff's Objection to

Greenwich Insurance Company's Motion for Summary Judgment, etc. ("Doten's Greenwich Opposition") (Docket No. 106) at 2 n.1. For the reasons set forth in my discussion of Count IV with respect to Fireman's Fund above, I recommend that summary judgment be entered for Greenwich on Count IV. I will address first the arguments made by Greenwich and the plaintiff that are specific to each of the counts still at issue and then consider an argument made by Greenwich which it contends entitles it to summary judgment on all of the counts.

a. Count I

Count I asserts a Miller Act claim against Greenwich. Complaint ¶¶ 13-15. Greenwich contends that it is entitled to summary judgment on this claim because the bond which it issued to JMG "is a common law bond and not governed by the Miller Act." Greenwich Motion at 11. The plaintiff does not respond to this argument, which is unsupported by any citation to the summary judgment record. None of the entries in the statement of material facts submitted by Greenwich would allow a reasonable factfinder to infer that the bond at issue was not governed by the Miller Act. The bond itself does not disclaim applicability of the Miller Act or otherwise demonstrate on its face any reason why the Miller Act should not apply. Subcontract Payment Bond ("Greenwich Bond") (Exh. J to Affidavit of Eric H. Loeffler in Support of Greenwich Insurance Company's Motion for Summary Judgment Against the Plaintiff (Docket No. 75). In the absence of both developed argument and evidentiary support, Greenwich is not entitled to summary judgment on Count I on this basis.

b. Count II

Greenwich contends that it is entitled to summary judgment on Count II of the second amended complaint because it "is not responsible for any alleged violations of the Prompt Payment Statute by its principal, JMG." Greenwich Motion at 11. In the alternative, it contends that it is not liable for any punitive

damages or penalties that may be incurred by JMG “in the absence of any statutory provision imposing such liability on the surety.” *Id.* Greenwich bases the former argument solely on the language of the bond, which makes it “liable for the payment of ‘labor and material used or reasonably required for use in the performance of the Subcontract.’” *Id.* The plaintiff responds that the bond allows an unpaid subcontractor to recover “all sums as may be justly due” and that language must be read to include interest, penalties and legal fees. Doten Greenwich Opposition at 8. In its own motion on this count, the plaintiff contends that a surety’s liability must be coextensive with that of its principal, citing a case from the California courts. Plaintiff’s Motion at 11.

I agree with the plaintiff’s interpretation of the language of the bond. The language cited by Greenwich merely provides that Greenwich will not pay if JMG promptly pays all claimants for all labor and material used or reasonably required for use in the performance of the claimant’s subcontract with JMG. Greenwich Bond. The bond goes on to provide that claimants who have not been paid in full by a certain time may sue on the bond “for such sum or sums as may be justly due claimant.” *Id.* This language cannot reasonably be read to absolve Greenwich of liability for JMG’s late payment under the Maine statute.²⁰

The California case cited by the plaintiff construes only California law. *T & R Painting Constr., Inc. v. St. Paul Fire & Marine Ins. Co.*, 29 Cal.Rptr.2d 199, 202 (Ct. App. 1994). Neither party cites any authority on the question whether Maine law imposes liability on a surety that is coextensive with that of its principal, but ancient case law suggests that it does. *Foxcroft v. Nevens*, 4 Me. 72, 1826 WL 307 at

²⁰ Greenwich’s citation to *Chadwick-BaRoss, Inc. v. T. Buck Constr., Inc.*, 627 A.2d 532, 536 (Me. 1993), for the proposition that a statutory right to recover attorney fees “will be found only in the clearest kind of language,” Opposition of Greenwich Insurance Company to Plaintiff Doten’s Construction, Inc.’s Motion for Summary Judgment (Docket No. 100) at 3, a case in which a completely different state statute was at issue, adds nothing to the court’s consideration of this issue. In any event, the Maine statute at issue does clearly provide a right to recover attorney fees. 10 M.R.S.A. § 1118(4).

*2 (1826). In any event, Greenwich does not really argue that this is not the case. Instead, it contends that it may only be held liable for penalties or punitive damages imposed on JMG if there is a statute specifically imposing such liability on a surety. Since Maine’s prompt payment statute imposes only penalties — interest, a penalty and attorney fees — this argument addresses Count II in its entirety. 10 M.R.S.A. §§ 1114(4), 1118(2), (4). Again, neither party cites any Maine authority on this point. The case law from other states cited by Greenwich is persuasive, however, because the “general rule” cited in those cases — that a surety may not be held liable for punitive damages or penalties in the absence of a specific statutory or contractual obligation imposing such liability or evidence that it authorized or participated in the act of its principal — is not limited to the laws of a single state. *See Dean v. Seco Elec. Co.*, 519 N.E.2d 837, 840 (Ohio 1988); *Butler v. United Pac. Ins. Co.*, 509 P.2d 1184, 1185 (Or. 1973) (citing Restatement of Security). Greenwich is entitled to summary judgment on Count II.

c. Count III

The plaintiff contends that it is entitled to summary judgment against Greenwich on Count III because a surety’s liability is coextensive with that of its principal, and JMG is liable to the plaintiff in *quantum meruit*. Plaintiff’s Motion at 8. My conclusion that the plaintiff is not entitled to summary judgment against JMG on this basis, discussed above, means that the plaintiff is not entitled to summary judgment against Greenwich on this count on the only basis offered by the plaintiff.

Greenwich makes no independent argument with respect to Count III in its motion for summary judgment.

d. Count VI

The plaintiff asserts that it is entitled to summary judgment on Count VI, which alleges breach of Greenwich’s bond, Complaint ¶¶ 33-37, because JMG breached its contract with the plaintiff and

Greenwich's liability is coextensive with that of JMG. Plaintiff's Motion at 6-7. Since I have determined that the plaintiff is not entitled to summary judgment against JMG on Count V, which alleges breach of contract by JMG, the plaintiff is not entitled to summary judgment on Count VI on the basis of JMG's alleged liability, the only basis presented by the plaintiff.

Greenwich makes no independent argument with respect to Count VI in its motion for summary judgment.

e. All Counts

Greenwich contends that it is entitled to summary judgment on all remaining counts asserted against it (Counts I, III, IV and VI) because its obligations under the bond were discharged as a matter of law due to a material alteration of the subcontract between the plaintiff and JMG. Greenwich Motion at 3-10. This argument is based on the change from the Oest design for the Project to the Becker design. *Id.* at 6. It is an affirmative defense. Answer of Greenwich Insurance Company, etc. (Docket No. 19), Ninth Affirmative Defense, at 7. Under Maine law, "[t]he principle is elementary that any material alteration in the terms of a contract for the performance of which a surety is bound, if made without the surety's consent, releases him from liability." *Maine Cent. R. R. Co. v. National Sur. Co.*, 94 A. 929, 931 (1915). The burden is thus on Greenwich to prove that the change in design for the Project was a material alteration in the terms of the contract between the plaintiff and JMG, for which its bond was issued, and that the change was made without Greenwich's consent. *See Federal Refin. Co. v. Klock*, 352 F.3d 16, 31 (1st Cir. 2003) (burden of proof falls on party asserting affirmative defense).

Greenwich mentions the second element of its burden of proof only in passing, asserting that "[t]he record contains no evidence that Greenwich was either aware of or consented to the radical alteration of the Subcontract." Greenwich Motion at 7. That is not the appropriate test for summary judgment on a claim

on which Greenwich, the moving party, bears the burden of proof at trial. On the issue of Greenwich's consent to any material alteration in the terms of the underlying contract, it is incumbent on Greenwich, which must know whether or not it did in fact consent, to include in the summary judgment record evidence on that point. It has not done so; nothing in the statements of material facts that it has submitted may reasonably be construed to address this point. The lack of evidence on this point makes it unnecessary to consider the issue that is extensively debated by the parties, whether the change in design represented a material alteration in the terms of the underlying contract. *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002) (if summary judgment movant has burden of proof on issue, it cannot prevail unless evidence that it provides on the issue is conclusive). Greenwich is not entitled to summary judgment on the basis of its affirmative defense.

IV. Conclusion

For the foregoing reasons, I recommend that (i) the motion of JMG Excavating and Construction Company, Inc. on Counts II-IV of its cross-claim (Docket No. 131) be **DENIED**; (ii) the motion of J.A. Jones Management Services, Inc. and Fireman's Fund Insurance Company for summary judgment on all counts of JMG's cross-claim (Docket No. 81) be **GRANTED** as to Counts II and III of the cross-claim and otherwise **DENIED**; (iii) the plaintiff's motion for summary judgment (Docket No. 66) be **GRANTED** as to Count I of the second amended complaint against defendant Fireman's Fund Insurance Company and as to Count II of the second amended complaint against defendant JMG Excavating and Construction Company, Inc. and otherwise **DENIED**; (iv) the motion of J.A. Jones Management Services, Inc. and Fireman's Fund Insurance Company for summary judgment (Docket No. 76) be **GRANTED** as to Counts II and IV of the second amended complaint and otherwise **DENIED**; and (v) the motion of Greenwich Insurance Company for summary judgment (Docket No. 72) be **GRANTED** as to Count II of

the second amended complaint and otherwise **DENIED**. The motion of Fireman's Fund Insurance Company to deem certain facts admitted (Docket No. 123) is **DENIED**. Remaining for trial, if the court adopts my recommendations, will be Count I of the second amended complaint against defendants JMG and Greenwich; Count III against all defendants; Count IV against defendants JMG and Greenwich; Count V against defendant JMG; and Count VI against Greenwich; and Count I of the cross-claim against Jones, Greenwich and Fireman's Fund and Count III of the cross-claim against Greenwich.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 17th day of November 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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for the use and benefit of
obo
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